COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION
AT RICHMOND, JUNE 6, 2001

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUE000584

For approval of a Functional Separation Plan under the Virginia Electric Utility Restructuring Act

ORDER GRANTING CONFIDENTIAL TREATMENT

On November 21, 2000, Virginia Electric and Power Company ("Virginia Power" or "Company"), by counsel, filed a Motion for Protective Order in which it seeks "confidential" treatment for certain information and also seeks enhanced confidential treatment for certain information designated as "competitively sensitive." Virginia Power attached a proposed protective order to its Motion. The Company contends that the procedures governing the treatment of "confidential" and "competitively sensitive" information in the proposed protective order are consistent with those of protective orders previously entered by the Commission.

With respect to confidential information, the language in Virginia Power's proposed order is similar to language we have adopted in protective orders in previous Commission proceedings. In brief, the Company proposes to disclose

confidential information filed under seal with the Commission to Staff, parties' counsel, and expert witnesses and support personnel working on this case, so long as those persons have executed an Agreement to Adhere to Protective Order.

With respect to the treatment of "competitively sensitive" information, the Company proposes three major restrictions. First, "competitively sensitive" information may be reviewed only at the office of the producing party and may not be copied. Second, "[e]mployees, officers, or directors of a party, or consultants or experts retained by a party, who have been and who are currently involved in the generation or marketing of electricity (whether at wholesale or retail) shall not be provided access to Competitively Sensitive Information." Third and finally, under the proposed order, "[i]ndividuals who become viewing representatives . . . may not engage in or consult in any generation or marketing of electricity proscribed in the previous sentence for three (3) years beginning and continuing after first viewing such Competitively Sensitive Information."

In the Commission's Order for Notice and Hearing in this case issued on February 22, 2001, we set the procedural schedule for the filing of responses by the Commission's

Staff, Protestants and other parties to the Company's Motion for a Protective Order.[1]

On March 15, 2001, the Virginia Committee for Fair Utility Rates (the "Virginia Committee") and the Division of Consumer Counsel, Office of the Attorney General (the "Attorney General") each filed a Response to Virginia Power's Motion for a Protective Order. Both the Attorney General and the Virginia Committee objected to specific portions of Virginia Power's proposed protective order.

Neither the Attorney General nor the Virginia Committee objected to the Company's proposed treatment of confidential information but both strongly objected to the designation and treatment of "competitively sensitive" information.

In its response, the Attorney General contended that any protective order should not include a blanket prohibition on copying any particular information. If a party objects to the copying of a specific document, the Attorney General argued, the protective order should place the burden on the objecting party to justify such treatment. The Attorney General further argued that prohibiting highly probative information from being copied may prevent that information from being used in

[1] Application of Virginia Electric and Power Company, For approval of a Functional Separation Plan under the Virginia Electric Utility Restructuring Act, Case No. PUE000584, Order for Notice and Hearing at 16, Ordering ¶ 14 (February 22, 2001).

any meaningful manner. Furthermore, the Attorney General opposed the proposed three-year restriction on participants' employment arguing that it may inhibit participants from viewing critical information. The Attorney General argued that "the general phrase generation or marketing of electricity swings a broad brush, the bounds of which are unclear and untested." The Attorney General requested that the "competitively sensitive" designation not be abused, if allowed at all, in this case. The Attorney General also requested that the Commission not determine at this time that any particular information falls under that new category.

The Virginia Committee, in its response, opposed the proposed restrictions on information designated as "competitively sensitive." The Virginia Committee contended that the Company's proposal denies persons working with and under the direction of counsel in this case, i.e. consultants and experts involved in the generation or marketing of electricity, access to any information the Company deems "competitively sensitive," thereby inhibiting those key experts' and consultants' ability to participate. The Virginia Committee further opposed the employment restrictions that prohibit those viewing individuals from "engag[ing] in or consult[ing] in any generation or marketing of electricity" for three years. The Virginia Committee argued such a

"draconian penalty" would frustrate parties' participation in this case, which would result in a predictably adverse impact on the Commission's deliberations. The Virginia Committee also opposed the limitations on copying and inspection of "competitively sensitive" information contending that such restrictions would severely reduce or eliminate the value of access to such information.

On April 2, 2001, Virginia Power filed a Reply stating the Attorney General and the Virginia Committee had authorized Virginia Power to state that they agreed to withdraw their objections, provided that certain additional language was included in the Company's proposed protective order. Virginia Power stated in its Reply its support for the inclusion of the additional language. Under the agreement, the following two sentences were proposed to be added to paragraph 5(a) on page 3, to be inserted immediately preceding the last sentence of the paragraph:

> The preceding two sentences[2] shall not apply to counsel, consultants, or expert witnesses on behalf of a party that is a customer or that represents customers of Virginia Power, provided that counsel,

[2] The two sentences referred to are: "Employees, officers, or directors of a party, or consultants or experts retained by a party, who have been and who are currently involved in the generation or marketing of electricity (whether at wholesale or retail) shall not be provided access to Competitively Sensitive Information. Individuals who become viewing representatives under this paragraph may not engage in or consult in any generation or marketing of electricity proscribed in the previous sentence for three (3) years beginning and continuing after first viewing such Competitively Sensitive Information."

> consultants, or expert witnesses sign a non-disclosure agreement with Virginia Power expressly stating that they are not and in the future, either (i) for a period that is one-year period from the date of a final order in this case or (ii) until December 31, 2002, whichever is earlier, will not be engaged directly in the operation or marketing of generation by potential competitors of Virginia Power and that they will not use the information for any purpose outside this case. No party is precluded from seeking a Commission order permitting documents containing Competitively Sensitive Information to be treated differently from the manner prescribed in this Order.

The central effect of this agreement is that counsel, consultants, or expert witnesses of parties who are customers or who represent customers will be allowed access to view competitively sensitive information so long as they execute a non-disclosure agreement stating that they are not currently involved in the generation or marketing of electricity, and will not be engaged in such activities by Virginia Power's potential competitors for a period "that is one-year period from the date of a final order in this case" or "until December 31, 2002, whichever is earlier."

NOW THE COMMISSION, upon consideration of this matter, is of the opinion that protection should be afforded certain information of the Company that requires confidential treatment in this proceeding, subject to the parameters we set forth below.

We will first address the Company's request regarding the handling of confidential information as distinguished from "competitively sensitive" information. It is significant that this Commission recently addressed the treatment of confidential information in the case adopting the Commission's new Rules of Practice and Procedure[3] (the "new Procedural Rules"). The new rule addressing confidential information, 5 VAC 5-20-170, provides that a party to a Commission proceeding may withhold information from disclosure on the grounds that it contains trade secrets, privileged, or confidential commercial or financial information, and may submit such information under seal to the Commission. The rule further provides that Commission Staff and Staff counsel will maintain the information in strict confidence. If and when confidentiality is challenged, the party objecting to disclosure must demonstrate to the Commission that the information should be withheld from disclosure. If the Commission determines that information warrants confidential treatment, the Commission may still allow for disclosure under an appropriate protective order. In addition to filing all confidential information under seal, the party requesting confidentiality must also file an expurgated or redacted

[3] See In the matter concerning revised State Corporation Commission Rules of Practice and Procedure, Final Order Promulgating State Corporation Commission Rules of Practice and Procedure, Case No. CLK000311, at 4-6 (April 30, 2001).

version of all information to be available for public review. We will adopt the substance of this new rule in fashioning relief for the Company in its request for protection of confidential information.

In accordance with the new Procedural Rules, we find that confidential information in this proceeding shall be disclosed to parties who execute an Agreement To Adhere To Order Granting Confidential Treatment attached as Attachment A (the "Non-disclosure Agreement") to this Order. We believe that this procedure will facilitate parties' access in this proceeding to confidential information. Parties who voluntarily agree to the provisions of this Order may obtain access to confidential information by executing the Non-disclosure Agreement. Those who do not may move to have this Order amended.

The language dealing with confidential information in our ordering paragraphs is similar to the language in Virginia Power's proposed protective order and to protective orders we have adopted in prior proceedings.[4]

In addition, we will impose filing deadlines to facilitate the process. As noted above, a party may obtain access to confidential information by executing the "Agreement

[4] See Application of Columbia Gas of Virginia, Inc., For approval of a special rate and contract, Case No. PUE990781, Hearing Examiner's Ruling, at 3-6 (February 17, 2000).

To Adhere To Order Granting Confidential Treatment" attached hereto as Attachment A. The party seeking confidential treatment must file redacted and unredacted versions of all information designated "confidential" and the unredacted filing should remain under seal, pursuant to Rule 5 VAC 5-20-170. Any party may object to the information's designation as confidential by filing a motion with the Commission. Parties who choose to execute the Non-disclosure Agreement and those who do not both reserve the right to object to the information being treated as "confidential."

Within five (5) business days of the filing of a motion, the party seeking confidential treatment shall file a reply. The reply must respond to each and every document that is subject to the requesting party's motion. The reply shall: (1) Identify and describe each document and all information, such description to include the character and contents of each document and all information; (2) Explain in detail why the information requires confidential treatment and should not be disclosed; and (3) Describe and explain in detail all harms that might be suffered as result of the failure of the information to be treated as confidential. Within ten (10) business days of the filing of the reply, the party seeking disclosure may file a response.

We note that Virginia Power's proposed protective order requires that Staff sign the Non-disclosure Agreement in order to obtain access to the confidential information. We find that Staff should not be required to sign the Non-disclosure Agreement. Staff will be subject to relevant provisions of this Order prohibiting dissemination of confidential information.

We will now address the Company's request for additional protection for information designated by the Company as "competitively sensitive." Notwithstanding the Attorney General's and the Virginia Committee's settlement with Virginia Power, we decline to adopt, at this time, any additional level of protection for information other than just described.

We are cognizant of the fact that as the Commonwealth continues to move toward competition in electric generation, certain commercially sensitive information will need to be handled in a confidential manner. Nevertheless, we find it is inappropriate and unnecessary to create a second level of confidential protection based on the record we have before us. The Company requests extraordinary protection for unidentified documents, but fails to provide any substantive reasons why current procedures would not provide its commercially sensitive information sufficient protection. Both the

Attorney General and the Virginia Committee opposed enhanced protective treatment for "competitively sensitive" information. The parties reached a settlement, but the Company essentially provided no explanation for why the settlement should apply to anyone else, including those who may not fit the exemption agreed to by the Attorney General and the Committee.

Our decision here must respond to the specific terms presented by the Company, including its original proposal. The issues here involve more than just a disagreement between parties to a proceeding. This case is critically important to the public interest of the Commonwealth, and we must be very reticent to limit access to information that may be instructive in the proceeding and upon which the parties may ask us to base our decisions. The Company requests shielding of all information it chooses to call "competitively sensitive." If adopted, this would provide for extraordinarily limited access to what could be volumes of Company documents.

The Company further requests that its "competitively sensitive" information be viewed but not copied. A great deal of the Company's information may be needed in this proceeding for the Commission to determine what is in the public interest. Restrictions that may unduly limit or even block

the use of such information could, in turn, adversely impact our determinations.

The Company's proposal allows only "counsel and designated regulatory and legal personnel and outside expert witnesses" to view designated "competitively sensitive" information. The proposal then specifically prohibits "employees, officers or directors of a party or consultants or experts retained by a party, who have been and who are currently involved in the generation or marketing of electricity (whether at wholesale or retail)"[5] from viewing the information.[6]

As written, the prohibition appears to apply to all who "have been" involved in the generation or marketing of electricity; there is no limit geographically or temporally to these prohibitions. Thus, a consultant who was involved in the generation of electricity in the 1960s in Guam could be

[5] The application of these provisions, when read together, is ambiguous. It is unclear whether counsel to parties may also be considered "consultants" and subject to the prohibitions.

[6] Further, the language "involved in the generation or marketing of electricity" is quite vague. The Company uses ambiguous language throughout this section of its proposed protective order. For example, the language barring persons "who have been and who are currently involved in the marketing or generation of electricity" can be read to bar each class of persons from viewing the information, both those persons who "have been" and also those persons who "are" conducting such activities (emphasis added). It can also be read to bar from viewing only those persons who fit into both classes. The latter reading does not seem to be the intended reading; however, this just serves as an example of the broad and vague application of the language in the Company's proposal.

barred from viewing the information. Such restrictions on past activities would be absurdly broad and could effectively prohibit participation in this proceeding by almost everyone who is knowledgeable in the electric industry.

Finally, and equally as egregious, the Company proposes a broad and geographically limitless three (3) year ban on employment "in the generation or marketing of electricity" for all viewers of "competitively sensitive" information not subject to the lower standard of the Attorney General's and the Virginia Committee's settlement. Under these restrictions, a viewing person could not be involved in the generation or marketing of electricity for three years, not even in the farthest corners of the world. We cannot condone and will not impose such broad and unreasonable restrictions on potential participants' access to information in this proceeding, particularly because the Company has not shown why the information needs the proposed extraordinary protection.

We are not aware that any other state has adopted a similar approach to that of the Company's proposal for "competitively sensitive" information. It is our understanding that the neighboring states of Pennsylvania and Maryland, which also have implemented electric generation competition, provide no higher level of protection from disclosure for commercially sensitive information than other

types of confidential information.[7] The treatment of confidential information by these states is consistent with the procedure adopted here for confidential information.

In recognizing that there may be certain, specific items of highly commercially sensitive information that the Company believes may require an additional level of protection than that afforded under this Order, we have included a procedure allowing the Company to request additional protection. Under the procedure we adopt, if a producing party believes that this Order does not afford the party sufficient protection for certain types of confidential information, the party may file a motion with the Commission requesting additional protective treatment. The producing party has the burden to demonstrate to the satisfaction of the Commission that this Order does not provide the particular information sufficient protection.

All information subject to the motion seeking additional protection shall be filed with the Commission under seal. The motion seeking additional protection shall: (1) Identify and describe each document and all information, such description to include the character and contents of each document and all information; (2) Separately, for each document and all

[7] See State Government Article, Title 10, Section 10-611 et seq. of the Annotated Code of Maryland and the Maryland Public Service Commission's Order No. 66276 (June 1, 1983); and see Pennsylvania Administrative Code, Title 52, Section 1.71 et seq.

information under the motion, explain in detail why the confidential treatment afforded under this Order is not sufficient to protect the party's interests; (3) Describe and explain in detail all harms that might be suffered if the information is not afforded the additional protection requested; (4) Explain its proposed additional restrictions and why such restrictions are the minimum necessary to protect that party. Within ten (10) business days of the filing of the motion, Staff and any party may file a reply to the motion. The petitioner will have five (5) business days to respond to any reply. The petitioner shall also file with the Commission a redacted version of the information of which it seeks additional protective treatment.

In proposing broad protective treatment for information designated as "competitively sensitive," the Company cites and relies upon the decision in the Virginia Power retail access pilot case. The Hearing Examiner in that case adopted, inter alia, the Company's two-tiered treatment of confidential and "competitively sensitive" information.[8] That matter, however, did not come before the Commission. We decline to adopt the

[8] See Ex Parte: In the matter of considering an electricity retail access pilot program-Virginia Electric and Power Company, Case No. PUE980813, Hearing Examiner's Ruling (June 29, 1999). The ruling also pre-dates the issuance of the new Procedural Rules.

Company's two-tiered proposal. We believe that the protections afforded by our ruling herein are sufficient.

We note that there have also been other Commission proceedings that have addressed this issue. In Application of GTE Communications Corporation of Virginia, For a certificate of public convenience and necessity to provide local exchange telecommunications service, Case No. PUC980080, cited in the Virginia Power pilot case, the Chief Hearing Examiner rejected a request for blanket immunity from the discovery of information designated by the Company as "competitively sensitive" and, in its place, adopted a case-by-case approach. This approach is not dissimilar to the one we adopt here.[9] In addition, the Hearing Examiner's ruling in the Virginia Power

[9] In GTE, the Chief Hearing Examiner held that the utility had the burden to show in each circumstance why certain information is so commercially sensitive that it should be protected from discovery. Application of GTE Communications Corporation of Virginia, Case No. PUC980080, Hearing Examiner's Ruling at 3 (September 14, 1998). Furthermore, as noted by the Hearing Examiner in the Virginia Power pilot case, the Chief Examiner in GTE Communications based her decision, in part, on Coca-Cola Bottling Company v. Coca-Cola Company, 107 F.R.D. 288 (D. Del 1985), which held that the formulae for Coca-Cola should be subject to discovery. The Coca Cola court held:

> Except for a few privileged matters, nothing is sacred in civil litigation; even the legendary barriers erected by The Coca-Cola Company to keep its formulae from the world must fall if the formulae are needed to allow plaintiffs and the Court to determine the truth in these disputes.

The Coca Cola court allowed the formulae to be released between the parties under protective orders in the interest of discovering the truth in that civil proceeding. We note that the significant interests of the public affected in this proceeding may far outweigh those interests supporting the release of the Coca Cola formulae.

pilot case did not follow our decision in Ex Parte: In the matter of requiring reports and actions related to independent system operators, regional power exchanges and retail access pilot programs, Case No. PUE980138, Order Establishing Investigation.[10] In that proceeding we held, in the context of addressing significant electric restructuring matters, that parties should have access to confidential information, including commercially sensitive information, unless the producing party identified the material to be withheld and demonstrated, with supporting detail, that harm to the Company would result from disclosure.[11] Our decision here is consistent with the requirements in that order.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

Any documents, materials, and information to be filed with the Commission or produced by any party to the Commission Staff or another party, that the producing party designates and clearly marks as confidential or as containing trade secrets, privileged or confidential commercial or financial information ("confidential information"), shall be filed, produced, examined, and used only in accordance with the

[10] Ex Parte: In the matter of requiring reports and actions related to independent system operators, regional power exchanges and retail access pilot programs, Case No. PUE980138, Order Establishing Investigation (March 20, 1998), 1998 SCC Ann. Rep. 402.

[11] Id. at 11-12 (March 20, 1998).

conditions set forth below. Information that is available to the public anywhere else will not be granted confidential treatment and shall not be designated as "confidential information" by any party.

(1) Parties shall clearly mark and file under seal with the Commission all information considered by the party to be confidential information. Parties shall also file with the Commission a redacted version of all documents containing confidential information.

(2) All confidential information filed or produced by a party shall be used solely for the purposes of this proceeding (including any appeals).

(3) Access to confidential information shall be provided and specifically limited to Staff and any party, their counsel and expert witnesses, and to support personnel working on this case under the supervision of said counsel or expert witnesses and to whom it is necessary that the confidential information be shown for the purposes of this proceeding, so long as each such person has executed an Agreement to Adhere to Order Granting Confidential Treatment ("Agreement"), which is Attachment A to this Order. Staff and Staff counsel are not required to sign the Agreement but are hereby ordered to preserve the confidentiality of the materials. All Agreements

shall be promptly forwarded to the producing party upon execution.

(4) Staff or any party may object to the confidential designation of particular information by filing a motion with the Commission. The Commission will conduct an in camera review of the challenged documents, materials, or information. The burden of proving that documents, materials, or information should be designated as confidential shall be upon the proponent of such treatment. In no event shall any party disclose the confidential information it has received subject to this Order absent a finding by the Examiner or the Commission that such information does not require confidential treatment.

(a) Within five (5) business days of the filing of the motion, the party seeking confidential treatment shall file a reply. The reply shall respond to each and every document and all information that is subject to the party's motion. The reply shall: (1) Describe each document and all information, such description to include the character and contents of each document and all information; (2) Explain in detail why the information requires confidential treatment; and (3) Describe and explain in detail all harms that

might be suffered as result of the failure of the document to be treated as confidential.

(b) Within ten (10) business days of the filing of the reply, the party objecting to confidential treatment may file a response.

(5) In the event that Staff or any party seeks permission to grant access to any confidential information to any person other than a person authorized to receive such information under paragraph (3) above, the party desiring permission shall obtain the consent of counsel for the producing party. In the event of a negative response, the party seeking disclosure permission may file a motion with the Commission for such permission and shall bear the burden of proving the necessity for such disclosure.

(6) The producing party shall be under no obligation to furnish confidential information to persons other than those authorized to received such information under paragraph (3) above unless specifically ordered by the Commission to do so. Parties are encouraged to seek consents to the maximum extent practicable.

(7) The Clerk of the Commission is directed to maintain under seal all documents, materials, and information filed with the Commission in this proceeding that the producing

party has designated as confidential information until further order of the Commission.

(8) A producing party is obligated to separate to the fullest extent practicable non-confidential documents, materials, and information from confidential information and to provide the non-confidential documents, materials, and information without restriction.

(9) To the extent that a party contends that it should not produce certain items of information because the terms of this Order do not provide sufficient protection to prevent harm to the producing party, the party may file a motion with the Commission requesting additional protective treatment. The producing party has the burden to demonstrate to the satisfaction of the Commission that this Order does not provide the information sufficient protection and that the proposed restrictions are necessary.

(a) The party seeking additional protection shall file all information for which it seeks additional protection under seal with the Commission. The party shall also file with the Commission a redacted version of all documents that contain the confidential information subject to the motion.

(b) The motion shall: (1) Describe each document and all information for which additional protection is sought, such description to include the character and contents of each document and all information; (2) Explain in detail for each document and all information why the confidential treatment afforded under this Order is not sufficient to protect the producing party's interests; (3) Describe and explain in detail all harms that might be suffered if the information is not afforded the higher protection; (4) Explain its proposed additional restrictions and why such restrictions are the minimum necessary to protect that party.

(c) Within ten (10) business days of the filing of the motion, Staff and any party may file a reply to the motion.

(d) Within five (5) business days of the filing of any reply, the producing party may file a response.

(10) In the event Staff or any party seeks to introduce at a hearing testimony, exhibits, or studies that disclose confidential information, Staff or the party seeking such introduction shall:

(a) notify the producing party at least three (3) days in advance of any such hearing regarding testimony that is not prefiled unless a shorter period would not unduly prejudice the producing party or is necessitated by the circumstances.

(b) if such testimony is prefiled, file unredacted copies of testimony, exhibits or studies with the Commission under seal, and also file with the Commission redacted copies of all such information, and serve on all parties of record redacted copies of the testimony, exhibits, or studies deleting those parts that contain references to or portions of the designated confidential information. The testimony, exhibits, or studies containing the confidential information filed with the Commission shall be kept under seal unless and until the Commission rules to the contrary. Each party that has signed Attachment A hereof shall receive an unredacted copy of the testimony, exhibits, or studies that contains references to or portions of the confidential information.

(11) Oral testimony regarding confidential information, if ruled admissible by the Commission, will be taken in camera

and that portion of the transcript recording such testimony shall be placed in the record under seal.

(12) No person authorized under this Order to have access to confidential information shall disseminate, communicate, or reveal any such confidential information or to any person not specifically authorized under this Order or subsequent order or ruling by the Commission to have access.

(13) At the conclusion of this proceeding (including any appeals), any originals or reproductions of any confidential information produced pursuant to this Order shall be returned to the producing party or destroyed if requested to do so by the producing party. At such time, any originals or reproductions of any confidential information in Staff's possession will be returned to the producing party, destroyed or kept with Staff's permanent work papers in a manner that will preserve the confidentiality of the confidential information. Insofar as the provisions of this Order restrict the communications and use of the confidential information produced thereunder, such restrictions shall continue to be binding after the conclusion of this proceeding (including any appeals) as to the confidential information.

(14) Any party who obtains confidential information and thereafter misuses it in any way shall be subject to sanctions

as the Commission may deem appropriate, in addition to any other liabilities that might attach from such misuse.

(15) This matter is continued generally.

BEFORE THE
STATE CORPORATION COMMISSION
COMMONWEALTH OF VIRGINIA

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At the relation of the

STATE CORPORATION COMMISSION **CASE NO. PUE000584**

For approval of a Functional Separation Plan under the Virginia Electric Utility Restructuring Act – Virginia Electric and Power Company

AGREEMENT TO ADHERE TO ORDER GRANTING CONFIDENTIAL TREATMENT

I, _____, on behalf of and representing _____, hereby acknowledge having read and understood the terms of the Order Granting Confidential Treatment entered in this proceeding by the Commission on June 6, 2001, and agree to treat all confidential information that I receive, review, or to which I have access in connection with this Case No. PUE000584 as set forth in that Order.

Signature:_____

Print Name:_____

On behalf of: _____